Pathmanathan a/l Paramasivam & Anor v Public Prosecutor and another appeal

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NOS P-05–381 OF 2010 AND P-05–382 OF 2010
KN SEGARA, SULONG MATJERAIE AND AZHAR MA'AH JJCA
2 MARCH 2012

Criminal Procedure — Trial — Defence's story — Whether defence's story figment of imagination of accused invented for trial — Defence claimed parcel containing drugs handed by first to second accused as wedding gift from third party — No evidence third party existed — Whether evidence showed accused knew parcel contained drugs — Whether accused failed to rebut presumption of trafficking

The appellants ('the accused') were convicted and sentenced to death by the High Court for jointly trafficking in 50.3g heroin and 7.4g monoacetylmorphine ('the drugs') contrary to s 39B(1)(a) of the Dangerous Drugs Act 1952. The prosecution had adduced evidence that on the night the accused were arrested, a police party, acting on information received, were lying in ambush at the rest and recreation area at Juru, Bukit Mertajam, Penang, when they noticed the first accused arrive at the scene. He parked his car and waited by its boot. A few minutes later another car, driven by the second accused, arrived. When the second accused walked over to meet the first accused and hand him a parcel, the police party closed in on the accused and after identifying themselves, arrested them after a struggle and seized the parcel which contained the drugs. The trial judge held that the accused had actual possession, custody and knowledge of the drugs and that they had a common intention to traffick in the drugs. The trial judge rejected the defence's story that the parcel was a wedding gift for the first accused delivered by the second accused from a man named Obay whom the accused met in a pub the night before. The trial judge found Obay did not exist. The accused appealed to the Court of Appeal against conviction and sentence on the ground the trial court had failed to judicially evaluate the evidence.

Held, dismissing the appeal and affirming the conviction and sentence:

(1) The story about Obay and the incident alleged to have taken place at the pub was a mere figment of the appellants' imagination invented for the purpose of the trial. The trial judge came to a finding that Obay did not exist. There was no flaw in her conclusion (see para 23).

(2) Based on the prosecution's narrative of the events that took place on the night in question, it was clear both appellants were in actual possession of

the drugs of which they had custody, control and knowledge. There was evidence of possession of the drugs independent of s 37(d) of the Dangerous Drugs Act 1952 (see para 17).

(3) There was no reason to disagree with the trial judge's conclusion that the appellants had failed to rebut the presumption of trafficking as mentioned in the charge. The appellants were rightly convicted (see paras 24–25).

[Bahasa Malaysia summary

Perayu-perayu ('tertuduh') disabitkan dan dihukum mati oleh Mahkamah Tinggi kerana mengedar bersama dadah heroin 50.3g dan monoacetylmorphine 7.4g ('dadah') bertentangan s 39B(1)(a) Akta Dadah Berbahaya 1952. Pihak pendakwaan telah mengemukakan keterangan bahawa pada malam tertuduh ditangkap, sepasukan polis, bertindak atas maklumat yang diterima, bersedia untuk serangan hendap di kawasan rehat dan rekreasi di Juru, Bukit Mertajam, Pulau Pinang, apabila mereka perasan tertuduh pertama tiba di tempat kejadian. Dia meletakkan keretanya dan menunggu di tepi but keretanya. Beberapa minit kemudian kereta lain, di pandu oleh tertuduh kedua tiba. Apabila tertuduh kedua berjalan kearah tertuduh pertama dan menyerahkan bungkusan, pasukan polis tersebut bergerak kea rah tertuduh dan selepas memperkenalkan diri mereka, menangkap mereka selepas pergelutan dan merampas bungkusan yang mengandungi dadah tersebut. Hakim bicara memutuskan bahawa tertuduh mempunyai milikan sebenar, jagaan dan pengetahuan mengenai dadah tersebut dan mereka mempunyai niat bersama untuk mengedar dadah tersebut. Hakim perbicaraan menolak cerita pembelaan bahawa bungkusan tersebut adalah hadiah perkahwinan untuk tertuduh pertama dihantar oleh tertuduh kedua daripada seorang yang bernama Obay, orang yang tertuduh temui di pub pada malam sebelumnya. Hakim perbicaraan mendapati bahawa Obay tidak wujud. Tertuduh merayu kepada Mahkamah Rayuan terhadap sabitan dan hukuman atas alasan mahkamah perbicaraan gagal untuk menilai secara kehakiman keterangan tersebut.

Diputuskan, menolak rayuan dan mengesahkan sabitan dan hukuman:

(1) Cerita mengenai Obay dan kejadian yang didakwa berlaku di pub adalah semata-mata khayalan perayu-perayu yang direka bagi tujuan perbicaraan. Hakim perbicaraan mendapati bahawa Obay tidak wujud. Tidak terdapat kecacatan dalam kesimpulannya (lihat perenggan 23).

(2) Berdasarkan naratif pihak pendakwaan mengenai kejadian yang berlaku pada malam yang dipersoalkan, adalah jelas kedua-dua perayu mempunyai milikan sebenar dadah tersebut yang mana mereka

mempunyai jagaan, kawalan dan pengetahuan. Terdapat keterangan milikan dadah tersebut bebas daripada s 37(d) Akta Dadah Berbahaya 1952 (lihat perenggan 17).

(3) Tidak terdapat alasan untuk tidak bersetuju dengan kesimpulan hakim perbicaraan bahawa perayu-perayu telah gagal untuk mematahkan anggapan pengedaran seperti yang dinyatakan di dalam tuduhan. Perayu-perayu dengan betul disabitkan (lihat perenggan 24–25).]

Notes

For cases on defence's story, see 5(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 5127–5128.

Cases referred to

PP v Basri bin Salihin [1994] 2 MLJ 476, HC (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 2, 37(da)(iia), (iiia), 37(d), 39B(1)(a), 39B(2)
Penal Code s 34

Appeal from: Criminal Trial No 45–47 of 2007 (High Court, Penang)

Haniff Hashim (Zamri bin Ibrahim with him) (Hanif & Co) for the first appellant.
K Kumarendran (Rashidah bt Mohamed Asharaf) (Kumar & Co) for the second appellant.
Siti Rafidah bt Zainuddin (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Azhar JCA (delivering judgment of the court):

[1] Both the appellant were jointly charged with an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') for trafficking in 50.3g of heroin and 7.4g of monoacetylmorphines ('the said drugs') and punishable under s 39B(2) of the same Act with s 34 of the Penal Code. At the trial they were found guilty and convicted on the charge and sentenced to death. Hence, this appeal.

THE PROSECUTION'S CASE

[2] The evidence adduced by the prosecution before the High Court as narrated by the learned judicial commissioner in the grounds of judgment are as follows:

Pada 26.2.2007 lebih kurang jam 9.30 malam, Cif Inspektor Rajaram a/l Arumugam (SP4) yang bertugas sebagai Pegawai Operasi dan Siasatan di Bahagian Siasatan Jenayah Narkotik, Ibu Pejabat Polis Kontinjen Pulau Pinang telah mengadakan satu taklimat berkenaan dengan operasi penangkapan kes dadah. Taklimat diadakan di Ibu Pejabat Polis Kontinjen, Pulau Pinang. Taklimat dihadiri oleh Cif Inspektor Santhadas a/l Venugopal (SP5), Detektif Koperal Azali, Detektif Koperal Azahari, Detektif Lans Koperal Azman, Detektif Lans Koperal Mansor dan Detektif Lans Koperal Ganesan.

Di dalam taklimat ini, SP4 telah memaklumkan kepada anggota-anggota serbuan, serbuan akan dijalankan di tempat meletak kereta di Hentian Rehat dan Rawat (R&R) Juru, Bukit Mertajam, Pulau Pinang. SP4 juga memaklumkan suspek-suspek kemungkinannya akan menaiki 2 buah kenderaan iaitu kereta jenis Proton Iswara Aeroback dan kereta jenis Perodua Myvi.

SP4 telah membahagikan pasukan serbuan kepada dua. Pasukan pertama terdiri dari SP4, SP5, Lans Koperal Azman dan Detektif Lans Koperal Ganesan yang menaiki sebuah kereta. Pasukan kedua terdiri dari anggota-anggota lain yang menaiki sebuah lagi kereta. Mereka semua berpakaian preman dan menaiki kenderaan pasukan yang tiada lambang polis. Perhubungan di antara pasukan pertama dan pasukan kedua adalah melalui walkie-talkie.

Pada jam 10.15 malam, pasukan serbuan telah bertolak ke Hentian R&R Juru, Bukit Mertajam, Pulau Pinang arah selatan. Pasukan serbuan tiba di sana pada jam lebih kurang 11.00 malam. Setibanya di Hentian R&R Juru arah selatan, pasukan pertama dan pasukan kedua telah mengambil tempat. Kereta yang dinaiki SP4 dan pasukan telah diletakkan di tempat meletak kereta yang ditanda X3 dalam rajah kasar (eksibit P21) manakala kereta pasukan kedua diletakkan di belakang kereta pasukan pertama.

SP4 bersama pasukan pertama dan pasukan kedua telah menunggu di dalam kereta sambil membuat perhatian. Semasa itu enjin kereta telah dimatikan dan tingkap kereta dibuka sedikit.

Pada jam 11.20 malam, SP4 dan SP5 melihat sebuah kereta jenis Proton Iswara Aeroback berwarna kelabu dengan nombor pendaftaran PLF 1046 telah memasuki kawasan Hentian R&R Juru arah selatan dan melepasi kereta yang dinaiki SP4 dan pasukan kedua. SP4 melihat kereta tersebut diletakkan di tempat meletak kereta di sebelah kiri kereta yang dinaiki SP4 iaitu di tempat bertanda X dalam rajah kasar. Jarak antara kereta yang dinaiki SP4 dan SP5 dan kereta tersebut adalah lebih kurang 7-8 meter.

Setelah lampu kereta dipadamkan, SP4 dan SP5 melihat seorang lelaki bangsa India keluar dari tempat pemandu dan telah pergi ke bahagian belakang kereta dan berdiri dekat boot kereta. SP4 dan SP5 melihat lelaki tersebut memandangkan ke arah kiri dan kanan seolah-olah menunggu kedatangan seseorang.

SP4 dan pasukan masih berada di dalam kereta dan saling berhubung dengan pasukan kedua melalui walkie-talkie.

Pada jam lebih kurang 11.30 malam, sebuah kereta Perodua Myvi berwarna perak dengan nombor pendaftaran PGX 3795 dilihat memasuki Hentian R&R Juru arah selatan dan melepasi kereta yang dinaiki SP4 dan SP5. Kereta tersebut telah berhenti di hujung pembahagi jalan di tempat tanda X2 dalam rajah kasar.

Selepas itu SP4 dan SP5 melihat seorang lelaki telah keluar dari kereta Perodua Myvi tersebut lalu melintas jalan dan menuju ke arah lelaki yang menunggu dekat boot kereta Proton Iswara Aeroback. Lelaki yang keluar dari kereta Perodua Myvi dilihat sedang memegang sebuah kotak di tangan kirinya. A

SP4 melihat lelaki yang memandu kereta Iswara Aeroback telah menoleh dan memandang ke arah pemandu kereta Perodua Myvi. Apabila mereka bertemu di tempat tanda X1 dalam rajah kasar, pemandu kereta Perodua Myvi telah menyerahkan kotak yang dibawanya kepada pemandu kereta Proton Iswara Aeroback. B

Sebaik sahaja penyerahan kotak berlaku, SP4 telah mengarahkan pasukannya dan menghubungi pasukan kedua melalui walkie-talkie untuk terus menyerbu ke arah kedua-dua lelaki tersebut. SP4 telah menjerit perkataan 'Polis' dengan suara yang kuat dan berlari ke arah lelaki-lelaki tersebut. C

Menurut SP4, kedua-dua lelaki tersebut dalam keadaan terkejut semasa SP4 dan pasukan serbuan membuat serbuan. SP4 dan pasukan cuba menahan kedua-dua lelaki tersebut dan telah berlaku pergelutan di antara mereka. Lelaki-lelaki tersebut meronta-ronta cuba untuk melepaskan diri. D

SP4 dan seorang anggota serbuan telah berjaya menahan pemandu kereta Proton Iswara Aeroback yang telah dicamkan sebagai OKT1. SP5 dan seorang anggota serbuan pula telah menahan pemandu kereta Perodua Myvi yang telah dicamkan sebagai OKT2. E

SP4 telah merampas kotak (eksibit P12) dari OKT1. Kotak tersebut adalah kotak minuman keras yang terdapat tulisan Chivas Brothers Royal Salute 21 Years Old Scotch Whisky. SP4 telah memeriksa dan membuka kotak tersebut. Di dalamnya terdapat 4 bungkusan kertas suratkhabar yang mengandungi 1 paket plastik lutsinar berisi serbuk dan ketulan kuning disyaki dadah heroin masing-masingnya. Jumlah keseluruhan ada 4 paket plastic lutsinar. Pemeriksaan ini dilakukan di belakang kereta Proton Iswara Aeroback. Semasa pemeriksaan ke atas kotak tersebut. OKT1 dan OKT2 ada berhampiran SP4 sambil dikawal oleh anggota-anggota serbuah. F G

SP4 telah membuat rampasan ke atas kotak dan isi kandungannya dan memberitahu OKT1 dan OKT2 kesalahan yang telah mereka lakukan dan menangkap mereka.

SP4 juga telah merampas barang-barang peribadi OKT1 dan OKT2 iaitu dompet, kad pengenalan, lessen memandu, wang tunai dan telefon bimbit (eksibit P26, P27, P28, P29 dan eksibit P30). H

SP4 seterusnya telah mengarahkan SP5 untuk membuat pemeriksaan ke atas kereta Proton Iswara Aeroback dan kereta Perodua Myvi. Pemeriksaan ke atas kedua-dua kenderaan tidak menjumpai apa-apa barang salah. I

SP4 seterusnya telah membawa OKT1 dan OKT2 bersama barang kes dan diikuti pasukan serbuan pergi ke Balai Polis, Bukit Tengah. SP4, SP5, OKT1, OKT2 dan Lans Koperal Azman menaiki kereta pasukan pertama.

FINDINGS OF THE TRIAL JUDGE

[3] In holding that a prima facie case had been made out against both the appellant, the learned judicial commissioner gave her reasons as follows:

(i) Isu Pemilikan

Oleh kerana kotak (P12) telah dikendalikan secara fizikal oleh OKT1 dan OKT2 bila mana OKT2 menyerahkan kotak kepada OKT1 di Hentian R&R Juru arah selatan, mahkamah ini mndapati OKT2 dan OKT1 ada kawalan dan jagaan ke atas kotak tersebut. Dengan itu pemilikan ke atas kotak beserta isi kandungannya dadah yang menjadi subjek pertuduhan adalah pemilikan sebenar (*actual possession*).

(ii) Isu pengetahuan

Walaupun kotak tersebut dalam keadaan tertutup, ini tidak boleh dijadikan alasan oleh OKT1 dan OKT2 untuk mengatakan mereka tidak tahu mengenal isu kandungan kotak tersebut. Pengetahuan boleh dibuat secara inferens berdasarkan kelakuan OKT1 dan OKT2 serta keterangan mengikut keadaan kes itu iaitu:

(a) OKT1 dan OKT2 bergelut dengan pasukan serbuan dengan cara meronta-ronta untuk cuba melepaskan diri sebelum mereka ditahan walaupun pasukan serbuan telah memperkenalkan diri sebagai 'Polis'. Ini menunjukan OKT1 dan OKT2 tahu mereka ada membawa barang salah.

(b) Perjumpaan OKT1 dan OKT2 di Hentian R&R Juru arah selatan pada 26 Februari 2007 jam lebih kurang 11.30 malam iaitu waku hampir lewat malam bukanlah secara kebetulan sebaliknya telah dirancang.

(c) Kotak tersebut tidak diseal atau dibalut, OKT2 yang membawa kotak tersebut boleh membuka kotak dengan mudah untuk melihat isi kandungan kotak tersebut pada bila-bila masa sebelum kotak tersebut diserahkan kepada OKT1.

Oleh yang demikian, Mahkamah ini mendapati OKT1 dan OKT2 mengetahui apa yang tekandung di daiam kotak tersebut. Rujuk kes *Pendakwa Raya lwn Abdul Rahman Akif* tersebut.

(iii) Kuantiti Dadah Yang Banyak

Dadah heroin seberat 50.3g dan monoacetylmorphines seberat 7.4g yang dijumpai di dalam kotak tersebut tidak memungkinkan untuk kegunaan peribadi OKT1 dan OKT2. Oleh kerana dadah yang terlibat adalah melebihi berat minima statutori 15g, oleh itu anggapan di bawah s 37(da)(iiia) Akta Dadah Berbahaya 1952 adalah terpakai. Sebagai alternatifnya, perbuatan OKT2 yang membawa kotak berisi dadah dan menyerahkan kepada OKT1 di Hentian R&R Juru arah selatan terjumlah kepada perbuatan mengedar iaitu transporting/carrying sebagaimana

yang ditakrifkan di bawah s 2 Akta Dadah Berbahaya 1952. Peruntukan di bawah s 2 Akta Dadah Berbahaya 1952 boleh berdiri dengan sendirinya tanpa bergantung kepada peruntukan di bawah s 39(da)(iia) Akta Dadah Berbahaya 1952.

(iv) Isu niat bersama waktu yang khusus di mana OKT2 menyerahkan kotak berisi dadah kepada OKT1, menunjukkan OKT1 dan OKT2 memang telah ada persiapan dan perancangan ke arah pengedaran dadah.

(v) Mahkamah ini berpuas hati dengan keterangan berkaitan dengan identiti barang-barang kes iaitu kotak dan isi kandungan kotak (eksh P12–P20). Keterangan saksi-saksi pendakwaan saling menyokong di antara satu sama lain. SP3, SP4 dan SP6 dapat mengecam barang-barang kes berdasarkan tandaan, tarikh, tandatangan dan catitan mereka pada barang kes apabila dikemukakan di mahkamah.

(vi) SP3 (ahli kimia) telah menjalankan analisa dan mengesahkan isi kandungan kotak adalah dadah heroin dan monoacetylmorphines seberat 57.7g.

Berdasarkan findings ini, mahkamah ini mendapati pihak pendakwaan telah berjaya membuktikan satu kes prima facie terhadap OKT1 dan OKT2. OKT1 dan OKT2 dengan ini dipanggil untuk membela diri.

THE DEFENCE OF THE APPELLANTS

[4] Upon being ordered by the trial court to enter upon defence the appellants stated their defence as follows.

[5] By way of background the appellants informed the court that the first appellant was about to get married to a Thai girl from Thailand by the name of Chanthana Sodapila (SD4). The wedding ceremony was to take place on 3 March 2007. On 25 February 2007 the first appellant went to a drinking joint in Perai known as Mega Hi-Tech Pub to meet the second appellant and the manager of the said pub to deliver wedding invitation cards. Also present at the pub at that time was one by the name of Rayappan, also known as Obay. Obay, on seeing the first appellant sarcastically teased the first appellant about him marrying the Thai girl. This had offended the first appellant and some altercation ensued between them whereby the second appellant and one by the name of Somasundram a/l Rajasegaran (SD3) had to intervene to appease the situation.

[6] The following day Obay met the second appellant at the said pub and informed the second appellant that he would like to settle amicably over the incident that took place between him and the first appellant the day before. As token of good gesture Obay requested the second appellant to deliver a wedding present to the first appellant. The second appellant agreed.

[7] At about 9.30pm on the same day Obay came to the pub again bringing with him a present that was to be delivered to the first appellant through the second appellant. Obay informed the second appellant about this. The second appellant who was then busy at his work place told Obay to leave the present at the pub counter and he would come and collect it later. At the same time the second appellant contacted the first appellant to inform him about the present that the second appellant was supposed to deliver to the first appellant. To this end, they agreed to meet at Hentian R&R Juru while the second appellant was on his way home. They agreed to meet at 11.30 that night.

[8] Having collected the said present from the pub at 11 o'clock, the second appellant proceeded to meet the first appellant at the appointed place accompanied by SD3. According to the second appellant the present that he collected from the pub was in a box. He or SD3 did not check or examine the content of the said box but just placed it on the rear seat of his car. Upon arrival at the appointed place the firnd appellant noticed that the first appellant was already waiting and standing outside his car at another spot whilst the second appellant parked his own car close to a Shell petrol station as there was no parking bay available near the first appellant's car. Then, SD3 left the car to go to toilet while the second appellant took the present from the rear seat and walked towards the first appellant and handed the box to the first appellant. At this juncture two Indian males appeared and rushed towards them shouting the word 'police'. Both the appellant were then apprehended and handcuffed. According to the appellants, they were not given a chance to say anything then.

[9] It was also the first appellant's version in his defence that when he went to the appointed place to meet the second appellant to collect the wedding present he was accompanied by his wife to be (SD4) and SD4's friend Som Phan Khamphiwphan (SD5) both of whom at the time of ambush by the raiding party were not at the scene as they had gone to nearby toilets.

[10] To lend credence to the above defence of the appellants defence also called and adduced evidence from SD3 whose testimony briefly was to support the appellants' claim that there was an incident and altercation between the first appellant and Obay at the pub earlier on. The bottom line of this is that they had been fixed up by Obay and they were just innocent carrier and receiver respectively.

THE APPEAL

[11] The main, if not the only ground of complaint before us is that the learned judicial commissioner in coming to a finding that the prosecution has made out a prima facie case, has failed to judicially evaluate the evidence. It was submitted that the learned judicial commissioner did not evaluate nor

scrutinise the credibility of SP4, SP5 and SP6 and other evidence adduced by the prosecution before calling for the appellants to enter upon their defence.

[12] It was submitted further that the learned judicial commissioner had wrongly found that the appellants had actual possession of the drugs merely by reason that they were seen carrying and receiving respectively the box P9.

[13] The learned judicial commissioner in addressing aforementioned issues in her judgment had these to say:

> Isu pemilikan
>
> Oleh kerana kotak (P12) telah dikendalikan secara fizikal oleh OKT1 dan OKT2 bila mana OKT2 menyerahkan kotak kepada OKT1 di Hentian R&R Juru arah selatan, mahkamah ini mendapati OKT2 dan OKT1 ada kawalan dan jagaan ke atas kotak tersebut. Dengan itu pemilikan ke atas kotak beserta isi kandungannya dadah yang menjadi subjek pertuduhan adalah pemilikan sebenar (*actual possession*).
>
> Isu pengetahuan
>
> Walaupun kotak tersebut dalam keadaan tertutup ini tidak boleh dijadikan alasan oleh OKT1 dan OKT2 untuk menyatakan mereka tidak tahu mengenai isi kandungan kotak tersebut. Pengetahuan boleh dibuat secara inferens berdasarkan kelakuan OKT1 dan OKT2 serta keterangan mengikut keadaan kes ini iaitu:
>
> (a) OKT1 dan OKT2 bergelut dengan pasukan serbuan dengan cara meronta-ronta untuk cuba melepaskan diri sebelum mereka ditahan walaupun pasukan serbuan telah memperkenalkan diri sebagai 'polis'. Ini menunjukkan OKT1 dan OKT2 tahu mereka ada membawa barang salah.
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> (b) Perjumpaan 0KT1 dan 0KT2 di Hentian R&R Juru arah selatan pada 26 Februari 2007 jam lebih kurang 11.30 malam iaitu waktu hampir lewat malam bukanlah secara kebetulan sebaliknya telah dirancang.
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> (c) Kotak tesebut tidak dibalut atau di*seal*, OKT2 yang membawa kotak tersebut boleh membuka kotak dengan mudah untuk melihat isi kandungan kotak tersebut pada bila-bila masa sebelum kotak tersebut diserahkan kepada OKT1.
>
> Oleh yang demikian, mahkamah ini mendapati OKT1 dan OKT2 mengetahui apa yang terkandung di dalam kotak tersebut.
>
> Kuantiti dadah yang banyak
>
> Dadah heroin sebanyak 50.3g dan monoacetylmorphines seberat 7.4g yang dijumpai di dalam kotak tersebut tidak memungkinkan untuk kegunaan peribadi OKT1 dan OKT2. Oleh kerana dadah yang terlibat adalah melebihi

berat minimum statutory 15g, oleh itu anggapan di bawah s 37(da)(iiia) Akta Dadah Berbahaya 1952 adalah terpakai. Sebagai alternatifnya, perbuatan OKT2 yang membawa kotak berisi dadah dan menyerah kepada OKT1 di Hentian R&R Juru arah selatan terjumlah kepada perbuatan mengedar iaitu 'transporting/carrying' sebagaimana yang ditakrifkan di bawah s 2 Akta Dadah Berbahaya 1952. Peruntukan di bawah s 2 Akta Dadah Berbahaya 1952 berdiri dengan sendirinya tanpa bergantung kepada peruntukan di bawah s 39(da)(iia) Akta Dadah Berbahaya 1952.

[14] On the point of common intention the learned judicial commissioner in her brief analysis on the facts with regard to the issue said these:

Isu niat bersama

OKT1 dan OKT2 telah datang ke Hentian R&R Juru arah selatan dengan dua buah kereta yang berasingan pada tarikh yang sama dan pada jarak waktu yang hampir sama. Dengan berada di Hentian R&R Juru arah selatan pada tarikh dan waktu yang khusus di mana OKT2 menyerahkan kotak berisi dadah kepada OKT1 menunjukkan OKT1 dan OKT2 memang telah ada persiapan dan perancangan ke arah pengedaran dadah.

[15] Although 'possession' is not specifically defined under the Dangerous Drugs Act 1952, for the purpose of criminal liability it simply means having custody and control combined with evidential or criminal proof of actual knowledge or circumstances clearly and irresistibly pointing to knowledge of the drugs exhibits.

[16] Possession through having control and custody — in order to incriminate a person, must be such that the possessor must know the nature of the things possessed (*Public Prosecutor v Basri bin Salihin* [1994] 2 MLJ 476).

[17] In the instant case we have the evidence of SP4 and SP5 who saw the first appellant's car approaching the scene of the crime and parked his car 7–8 meters away from the witnesses car. They saw the first appellant standing behind the boot of his car as if waiting for someone. About 10 minutes later SP4 and SP5 noticed another car, a Perodua Myvi driven by the second appellant approaching and parked at the end of the parking area. The second appellant was seen alighting from the car and crossing the road over to the first appellant's car. At the same time SP4 and SP5 also saw the second appellant carrying a box in his left hand approaching the first appellant. Then the witnesses saw the second appellant handing over the said box to the first appellant. It was at this juncture that the raiding party decided to close in, and seized the box containing the drugs in question. According to the witnesses some struggle took place during the process of apprehending the two

appellants. With the aforementioned scenario and event that took place it is clear to us that both the appellant were in actual possession of the drugs in question of which they have custody and control as well as knowledge.

[18] Although it was submitted on behalf of the appellants that SP4 and SP5 are not witnesses of truth, no reason whatsoever was given for saying so. We on our part could find no valid and cogent reason not to believe these witnesses. We hold them to be witnesses of truth.

[19] It is our view too, that the circumstances of the meeting of the two appellants gave rise to some suspicion that they had planned some ungodly act ie to deliver the drugs in question. This evinced their common intention.

[20] In the light of the above, we find that the evidence adduced by the prosecution before the learned judicial commissioner showed that the two appellants were clearly in possession of the box (P9) and that they had knowledge of the contents of the box. The facts denote that the said drugs were in their custody and control. There was evidence of possession of the drugs independent of s 37(d) of the Act.

[21] The dangerous drugs as per charge were in excess of 15g as provided under s 37(da)(iiia) of the Act and this would trigger the presumption of trafficking as provided in s 37(da) of the Act. Premised upon these facts the learned trial judge was correct in finding that a prima facie case has been made out against both the appellant.

THE DEFENCE

[22] The learned judicial commissioner after hearing evidence from both appellant and three other witnesses decided to reject the defence of the appellants.

[23] Apparently, one of the issues that was addressed by the learned judicial commissioner in appraising the defence evidence is the existence of Obay who was alleged to have requested the second appellant to hand over the box P9 to the first appellant. The learned judicial commissioner after considering the evidence as a whole came to a finding that this Obay did not exist. The event that was alleged to have taken place at the pub that led to the giving of so called present in the form of P9 to the first appellant was a concoction by the defence. We, on our part after perusing the entire evidence in the proceedings do not find any reason to disagree with the finding of the learned judicial commissioner. We find no flaw in her conclusion. As such we hold that the

story about Obay and the incident alleged to have taken place at the pub was a mere figment of the appellants' imagination invented for the purpose of the trial.

[24] On minute analysis of the appellants' defence, the learned judicial commissioner concluded that the appellants had failed to rebut the presumption of trafficking as mentioned in the charge. We find no reason to disagree with the aforesaid conclusion.

[25] To keep within the limit of our function as the appellate court, we decline to interfere with the findings of facts arrived at by the trial court to which the law entrust the primary task of evaluation of the evidence. In short, the appellants were rightly convicted.

[26] For the above reasons, we dismissed the appeal and uphold the conviction and also affirm the sentence.

Appeal dismissed and conviction and sentence affirmed.

Reported by Ashok Kumar